

**SUPPORT TO CRIMINAL JUSTICE REFORM
IN UKRAINE**



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**COMMENTS OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE
OF LAW (DIRECTORATE OF HUMAN RIGHTS) OF THE COUNCIL OF EUROPE**

ON THE DRAFT LAW OF UKRAINE

***"On Amending the Criminal Procedure Code of Ukraine Pertaining to
Provisional Seizure of Property and Conducting a Search"***

Prepared on the basis of contribution by

Erik Svanidze

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A. Introduction

1. These comments are concerned with the draft Law of Ukraine "On Amending the Criminal Procedure Code of Ukraine with regard to Provisional Seizure of Property and Conducting a Search" N2181 ('the Draft Law'), which was submitted to the Verkhovna Rada by People's Deputies (M. Palamarchuk and O. Prodan).
2. The comments have been prepared by the Council of Europe consultant Mr. Erik Svanidze¹ under the auspices of the Council of Europe's Project "Support to Criminal Justice Reform in Ukraine" ('the Project'), financed by the Danish Government.
3. The comments are based on an English translation of the Ukrainian text of the Explanatory Note to the Draft Law and comparative table of the amendments suggested by the Draft Law to the relevant provisions of the Criminal Procedure Code ('CPC').
4. The comments first address the rationale and need in amendments proposed in the Draft Law and their text in terms of the requirements of the European Convention on Human Rights ('ECHR') and coherence with the reform of Ukrainian criminal procedure and justice sector in general.

B. General considerations

5. According to the explanatory note for the Draft Law it is 'directed to protect the rights of an enterprise, establishment or organisation and citizens during the time when investigative actions related to provisional seizure of property, including during a search, are being conducted.' It suggests that the omission in the current CPC of a requirement for the investigator to provide a copy of search record to a person who undergoes a search and seizure of property provides an opening for different abuses and makes it more difficult to challenge the results of the investigative activities in issue.
6. Indeed, the evaluation exercise of the implementation of the CPC carried out by a group of the Council of Europe consultants in 2014-2015 confirmed that there are assertions as to the need to reinstate protocols of searches, improve their accuracy (especially, in terms of listing the items seized during them) and indications as to numerous incidents of searches being carried out improperly.

¹ Mr Erik Svanidze is a former prosecutor in Georgia, deputy minister of justice, member/expert of the European Committee for the Prevention of Torture, member of the Council of Europe group of consultants providing expert advice on the new Criminal Procedure Code, Law on the Public Prosecution Service (including the relevant joint opinion of the Directorate of Human Rights and the Venice Commission (2013 (CDL(2013)039)) and other related legislative acts of Ukraine.

7. At the same time, part 3 of Article 168 and part 8 of Article 236 already unequivocally provide for the compiling of a record of provisional seizure of property and search of home or possessions. In combination with the provisions of Chapter 5 on the general rules applicable to the recording of a procedural action, reference to records in general are found in a series of other norms, notably, in Article 42 on relevant rights of a suspect and accused concerning their questioning and other records², Article 221 concerning review of ‘all records of the pre-trial investigation’ and Article 223 referring somewhat inconsistently but still mentioning "procedural documents, which were drawn up’ and ‘records of pre-trial proceedings".
8. However, taking into account recurrent assertions as to insufficiency of the existing provisions for securing the right to respect for home and property protected by Article 8 of the ECHR and Article 1 of Protocol No. 1 to the ECHR, the proposed Draft Law is to be welcome. It is in line with the recommendation made in the report prepared by the Council of Europe consultants upon the abovementioned evaluation of the CPC implementation that *the Code should be amended so as to require a copy of the protocol, together with a record on it of any comments, to be served on the owners of the premises concerned or on other relevant persons.*³

C. Provision by provision analysis

Amendments to Article 168 (Provisional Seizure of Property) of the CPC

9. The Draft Law proposes to amend part 3 of Article 168 of the CPC already envisaging that an investigator, public prosecutor, other authorized official is obliged to draw up an appropriate record during apprehension or search and provisional seizure of property or immediately thereafter, with a clause obliging to hand ‘a copy of it to the person whose property was seized, or its representative’.⁴
10. The proposed amendment is not problematic, provided it is specified that a protocol is to be compiled regardless of results of the activity, i.e. any items/property being seized.
11. Furthermore, the proposed safeguard could be reinforced by a requirement that a copy is handed over ‘against a signature of the person concerned’.

² Clauses 10 and 14 of Part 2.

³ Report on an evaluation of the implementation of the Criminal Procedure Code of Ukraine, May 2015, Para. 296.

⁴ The comment has been developed under the assumption that the English translation is erroneous (in terms of using ‘it’) and the original refers to a representative of the person, whose property was seized and not the property itself.

Amendments to Article 236 (Execution of the ruling to authorise search of home or any other possession of a person) of the CPC

12. In addition to the commented part 8,⁵ the Draft Law proposes to introduce in Article 236 a new part (9) specifying that the '[s]econd copy of the search record, together with a list of seized property (if available)⁶ shall be handed to the person who underwent the search, and in case of his absence - to an adult member of his family or his representative' and '[w]hen search is conducted at an enterprise, establishment or organisation, the second copy of the search record shall be handed to the manager or representative of the enterprise, establishment or organisation'. The proposed amendment is acceptable.
13. However, similarly to Article 168, the proposed safeguard could be reinforced by a requirement that a copy is handed over 'against a signature of the person concerned'.

D. Conclusion

14. The amendments to the CPC proposed by the Draft Law would improve the clarity of the legal framework and procedures to be followed, reinforce protection of the legitimate interests of the individuals and legal entities subjected to the investigative activities in question (provisional seizure of property and searches) and are to be welcome. At the same time, it would be advisable to reinforce them by including a counter-signing clause.

⁵ See para. 7 of the current comments above.

⁶ The comment has been developed under the assumption that the wording 'if available' in English translation is used in the meaning of 'if any seized'.